Supreme Court, U.S.
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No. 87-300

In The
Supreme Court of the United States
October Term 1987

CAREY CANADA, INC.,

Petitioner,

vs.

JAMES E. HINELY AND 25 OTHERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

OPPOSITION BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether the discovery sanction of partial default for willful violation of court orders issued under Georgia law by the trial court and upheld by the Supreme Court of Georgia, unconstitutionally violated due process of law.

(2) Whether a trial court may enter partial default as a discovery sanction under the law of Georgia for a willful violation of court orders to produce documents located in the United States.

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STATEMENT OF THE CASE

Respondent submits the following background to supplement the Petition's history of the case:

In 1980, twenty-six men brought actions against Petitioner Carey Canada, Inc., a multi-national asbestos producer, which had mined asbestos for sale in Georgia and other states since 1918. All of the twenty-six have been diagnosed with permanent asbestos-induced lung damage.

Asbestosis is a latent disease, manifesting in diseased lungs twenty or thirty years after initial contamination. To prevail on liability issues at trial, Plaintiffs are required to prove decades of wrongdoing. Toward that end, Plaintiffs filed requests seeking business records from Petitioner Carey on December 21, 1982. Plaintiffs then filed Letters Rogatory seeking comprehensive document production in April, 1983. R.335.

Petitioner refused to produce any records. In responses to discovery demands, Petitioner contended it was prohibited from producing records by a Quebec statute that banned transfer of business records across Quebec borders. R. 273.

Two years of motions, hearings and appeals ensued, pitting the Quebec Business Concerns Records Act (hereinafter "Quebec Act") against the record production procedures of the Georgia Civil Practice Act. On November 17, 1983, the trial court ordered Petitioner to produce. R.370. The trial court's rulings were affirmed in Chatham County Superior Court, and in direct appeals to the Georgia Supreme Court in January 1984, April 1984, and August, 1984. Each of Petitioner's objections and appeals cited the constraints of the Quebec Act. *See* R.258-460.

In October, 1984, Respondents learned that Petitioner had failed to disclose the existence of relevant documents in the Tampa, Florida offices of Jim Walter Corporation, Petitioner's corporate parent. Petitioner had admitted in 1983 that business records in the U.S.A. were beyond the Quebec Act's prohibition. *Transcript of Proceedings,* Sept. 29, 1983, at p.8.

Respondent moved for sanctions to compel production of the United States documents. Faced with overwhelming evidence of bad faith and willful disobedience, the court issued an Order imposing sanctions on Petitioner. R.580. The Order cited Petitioner's failure to respond to Requests to Produce and Petitioner's failure to comply with Letter Rogatory. R.581. The Order struck Petitioner's defensive pleadings in all twenty-six cases, pursuant to O.C.G.A. § 9-11-37(b)(2)(A), (B), and (C).

The Order found that Petitioner had committed specific contemptuous acts, as follows:

> Every effort by this Court to effect discovery without an order to compel was made by this Court only to meet with a direct refusal to discovery (sic). (R.580)
>
> . . . The refusal of Defendant Carey Canada to discover spanned a period commencing in the early part of 1982 until the Court issued orders compelling discovery from said Defendant on November 16, 1983. (R.581)
>
> . . . In every hearing by this Court prior to the order compelling discovery defendant steadfastly refused to produce *any documents requested* under the claim that the documents were (1) in Canada and (2) the Canadian laws prohibited disclosure of such records . . . The refusal to produce the documents by

> Defendant Carey Canada was and is a continuing willful and intentional evasion of the discovery process as well as the orders of this Court. (R.583)
>
> . . . the Court finds the said Defendant Carey Canada in willful contempt of this Court for each day it has failed to comply with the order of this court to produce records to the Plaintiffs *which Defendant knowingly had in its control and custody in the United States of America.* (emphasis in original).

R.583. (See Appendix).

On appeal, the Georgia Court of Appeals affirmed the trial court's entry of factual findings, except for the finding that plaintiff's injures were asbestos-related. The panel rejected Petitioner's remaining 14 enumerations of error, and upheld the trial court's remaining findings of fact. The Georgia Supreme Court subsequently denied certiorari to Petitioner's request for an appeal of the default sanctions.

ARGUMENT

(1) No Important Question Of Constitutional Law Is Present In The Petition

Petitioner contends, as to the trial court's entry of factual findings, that the sanctions were excessive under O.C.G.A. § 9-11-37(b)(2)(A). Subsection (b)(2)(A) permits, as a sanction, that the relevant subject matter of a violated discovery order may be established as proven for the purposes of trial. *See* O.C.G.A. § 9-11-37(b)(2)(A). Of course, where a violation is willful, the trial court may

impose more severe sanctions, including default, under subsection (b)(2)(B) and (C). *Swindell v. Swindell,* 233 Ga. 854, 213 S.E.2d 697, 700 (1975).

The trial court's order, and the opinion of the Georgia Court of Appeals, demonstrate that Petitioner suffered default after willfully concealing documents in fraudulent violation of two court orders to produce. In similar circumstances, this Court has recognized that default sanctions do not violate due process of law. Numerous cases cited by Petitioner upheld default sanctions under Federal Rule of Civil Procedure 37(b)(2)(C), the precise analog to Georgia Code section 9-11-37(b)(2)(C). This Georgia statute, not § 9-11-37(b)(2)(A) nor (B), determined the result below.

Due process does not require that a court limit its sanction to the scope of the court order that has been violated. Instead, the contumacy of the disobedient party, in itself, gives basis to the legal presumption that the party has admitted the absence of any defense. In effect, the egregiously disobedient party forfeits its right to further hearing of certain defenses. Rule 37(b)(2)(C) contemplates precisely this result.

No important federal question is raised by the Petition. This Court long ago determined that default could be imposed for willful disobedience of court orders to produce documents. *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351 (1909). The fact that the default findings may support punitive damages is not a violation of due process, but one that accompanies all defaults—even those imposed for simple failure to answer, and those based on failure to respond to Requests to Admit.

(2) The Trial Court Sanctioned Petitioner For Concealing Documents In The United States, As To Which No Canadian Law Applied

The Petition claims that the trial court violated due process when it found Petitioner in default for willfully defying two court orders to produce documents in Canada. This is incorrect. In fact, the court order dealt with non-production of documents in Tampa, Florida. Petitioner conceded, as it must have, that no Canada law prohibited production of documents located in the United States.

Similarly, Respondents take exception to the assertion in the Petition that Petitioner notified Respondents of the concealed documents. P. 28, n.4. The reviewing courts of Georgia found this assertion to be without support in the record. Petitioner never disclosed to Respondents nor to the Court the existence of documents in the United States.

Petitioner's enumeration simply does not raise facts on which this court may determine whether sanctions for compliance with a foreign sovereign's law violate due process.

———o———

CONCLUSION

For the reasons stated in the order of the trial court, and in the opinion of the Georgia Court of Appeals, and for those above, Respondent prays that the Petition filed on behalf of Carey Canada be denied.

Respectfully submitted,

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ORDER ON MOTION OF PLAINTIFF FOR SANCTIONS AGAINST DEFENDANT CAREY CANADA, INC.

Plaintiffs in the above stated cases filed Request for Admissions May 3, 1982 and interrogatories at various dates.

Plaintiffs also filed a Request to Produce certain documents on December 21, 1982.

Upon the refusal to discover under the methods above set forth this Court after notice and hearing on at least two occasions if not more heard Plaintiff's Motion to Compel Defendant Carey Canada to respond to the Discovery Request.

At one hearing Defendant through its authorized legal counsel proposed that it would have no objection to discovery in Canada if the Court would issue Letters Rogation. Said Defendant assured the Court they would respond timely and appropriately to such discovery procedure.

In response to this agreement the Court commenced the procedure for such discovery method agreed to by Defendant. The Court immediately found itself wading in a sea of objection to "Letters Rogation" filed by Defendant as not being an acceptable method of discovery.

This is but one example of what this Court has had to contend with from said Defendant in an effort to agreeably have discovery made by said Defendant since the commencement of this litigation. Every effort by this Court to effect discovery without an order to compel was made by this Court only to meet with a direct refusal to

discover. Following the futile efforts of this Court to effect discovery voluntarily by said Defendant Carey Canada this Court ordered the production of the documents in its Order of November 16, 1983. Defendant Carey Canada to date has failed to produce the documents ordered by this Court although they have responded to the other discovery request.

Subsequently this Court after notice and hearing to all parties heard Plaintiffs' Motion for Sanctions against said Defendant Carey Canada for failing to produce the documents requested. The hearing of the sanctions was held after all decisions were rendered by the Appellate Courts of this State.

Based upon the record of these asbestossis cases, based upon the efforts of the presiding Judge in these cases to effectuate meaningful discovery without orders compelling discovery, based upon Defendant Carey Canada's refusal to discovery until ordered to discover by this Court not only as to the production of documents but also as to the other methods of discovery initiated by Plaintiffs, the Court can arrive at no other finding but that the Defendant Carey Canada, willfully and intentionally refused to discover prior to and subsequent to the order of this Court compelling discovery. The Defendant has failed to comply with the Order of this Court to produce the documents ordered to be produced.

The refusal of Defendant Carey Canada to discover spanned a period commencing in the early part of 1982 until the Court issued orders compelling discovery from said Defendant on November 16, 1983.

In response to these orders compelling discovery said Defendant immediately sought equity relief from the Superior Court of Chatham County, and sought writs of prohibition in Courts throughout the State of Georgia.

Said Defendant under the Order of November 16, 1983 to compel answered interrogatories and request for admissions on December 9, 1983, a period exceeding a year in which this Court endeavored to have discovery made without compelling said Defendant to comply.

As to the production of documents. In every hearing held by this Court prior to the order compelling discovery defendant steadfastly refused to produce *any documents requested* under the claim that the documents were (1) in Canada and (2) the Canadian laws prohibited disclosure of such records.

An interesting event occurred in Chatham County in the Halls of Justice in the Federal District Court, Southern District, Savannah Division *prior to this Court issuing its orders to compel on November 16, 1983.* A disclosure was made to the Federal Judge presiding in the Asbestos cases pending for trial in that forum, that Defendant Carey Canada possessed relevant documents to the asbestos litigation in the State of Florida, U.S.A. The Defendant Carey Canada did not disclose this information to this Court nor has the Defendant to this date disclosed to this Court that such documents exist.

Obviously the State Court of Chatham County is not the only Court in the United States that has been confronted with the dilatory practices of Defendant Carey Canada. Attached as Exhibit "A" to this Order and in-

corporated into this order is a copy of orders dated September 26, 1984, of the United States Magistrate, United States District Court for the District of Massachusetts.

The Court finds that the documents sought by Plaintiffs are relevant and necessary to the discovery process calculated to lead to the discovery of admissible evidence in the litigation which is complicated, which involves multiple parties with varying business relationships in mining, producing, manufacturing, and distributing products containing asbestos. The Court granted Plaintiffs' Motion to Compel Production *November 16, 1983.* The opposition of Defendant Carey Canada to the Motion to Compel was not substantially justified. The refusal to produce the documents by Defendant Carey Canada was and is a continuing willful and intentional evasion of the discovery process as well as the orders of this Court. Defendant has totally abused the discovery process provided under the Laws of Georgia.

This Court having entered an order under C.P.A. 37(a) on November 16, 1983 which Defendant has willfully refused to comply with said order the Court enters the following sanctions against said Defendant Carey Canada in each of the above stated cases as follows:

EXPENSES AND ATTORNEY FEES

Each Plaintiff in the above stated cases is awarded reasonable expenses and attorney fees in an amount to be determined by the Court at an evidentiary hearing on a date subsequent to this order.

FINE FOR CONTEMPT OF COURT

Under O.C.G.A. 9-11-37 (b)(2)(D) in addition to the other sanctions issued herein the Court finds the said Defendant Carey Canada in willful contempt of this Court for each day it has failed to comply with the order of this Court requiring it to produce records to the Plaintiffs, *which Defendant knowingly had in its control and custody in the United States of America.*

Under O.C.G.A. 15-6-8 (5) the Court fines said Defendant Carey Canada, the sum of $500.00 for each day commencing and including December 9, 1983, and each day thereafter as a continuing contempt *to the date of this order.* And upon failure of said Defendant Carey Canada to comply with said Order of November 16, 1983, upon notice and hearing the Court shall consider further fines. The Defendant, Carey Canada, may produce said records and purge itself of further fines for non compliance with the orders of this Court.

Further Sanctions under O.C.G.A. 9-11-37
(b)(2)(A)(B)(C).

For the willful failure of Defendant Carey Canada to produce the documents sought by Plaintiff under the discovery process the Court issues the following sanctions:

It is Ordered:

1. The following facts, matters and conditions are established as true for purposes of the above-referenced lawsuit:

(a) That Defendant Carey Canada, Inc. did sell asbestos containing products;

(b) That Plaintiffs were exposed to the asbestos containing products sold by Defendant Carey Canada, Inc.;

(c) That Plaintiffs have suffered personal injury and/or death as a result of being exposed to the asbestos containing products sold by Defendant Carey Canada, Inc.;

(d) That the Defendant Carey Canada, Inc., failed to warn the Plaintiffs and each of them of the dangerous characteristics of their asbestos-containing products and is, therefore, guilty of negligence as a matter of law;

(e) That the Defendant Carey Canada, Inc. knowingly suppressed and covered up knowledge of the dangers of asbestos in order to maximize corporate profits in complete and utter disregard of the adverse health effects upon persons exposed to asbestos products manufactured and sold by Defendant Carey Canada, Inc.;

2. That Defendant Carey Canada, Inc. is prohibited from submitting or offering any evidence or testimony to contradict any facts alleged by Plaintiffs or to support any defenses alleged by Defendant Carey Canada on any issues of liability.

So ordered this 31st day of December, 1984.

/s/ James W. Head
JAMES W. HEAD, SENIOR JUDGE
STATE COURT OF CHATHAM COUNTY